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No. 99-72

IN THE
Supreme Court of the United States

CHEMINOR DRUGS, LTD.; and
REDDY-CHEMINOR, INC.,

Petitioners,

v.

ETHYL CORPORATION; and
JOHN DOES 1 THROUGH 10,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

REPLY BRIEF FOR PETITIONERS

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PRELIMINARY STATEMENT

This petition for certiorari squarely presents the question "whether and, if so, to what extent *Noerr* permits the imposition of antitrust liability for a litigant's fraud or other misrepresentations" left open in *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, 508 U.S. 49, 61 n.6 (1993) ("*PRE*"). Even Ethyl concedes that the *PRE* Court "left open" this issue. Resp. Br. at 12.

The Circuit Courts of Appeals are now in conflict on this issue: the Ninth and D.C. Circuits hold that misrepresentations which are significant to agency decision making taint the adjudicatory process and are not immunized, while the Third Circuit holds that such misrepresentations are immunized unless the plaintiff can prove that the misrepresentations actually changed the outcome of the proceeding. The different tests applied in the Circuits are not merely semantic. When the two tests are applied to the facts of this case they produce *Noerr* immunity in the Third Circuit and no immunity for the same misconduct in the D.C. and Ninth Circuits.

Ethyl persuaded the Third Circuit that its fraudulent petitioning concerned only three of five statutory factors, each of which the ITC was required by law to consider. The Circuit concluded therefore that no matter how damaging those misrepresentations were to Cheminor's case, Cheminor could not prove that the petitioning could not have been successful based on the other two factors. Ethyl's misconduct enabled it to obtain a preliminary determination providing for exorbitant duties which effectively eliminated Cheminor from the United States ibuprofen market during a particular time period when Ethyl was uniquely and significantly vulnerable to competition.

Thereafter, while Ethyl was in a position to capitalize on its victory, Ethyl withdrew its fraudulent petition to avoid the

defeat on the merits that Ethyl and its attorneys knew was sure to follow. Ethyl's own documents demonstrate that it played fast and loose with the ITC in a way that *Noerr* immunity should not protect.

> The ITC is expecting a partial response from Ethyl today. *We have worked out an understanding that we will only resubmit today what we submitted last September and will subsequently provide full year 1991 data 'later' this month.* No fixed date has been set so far. *Our intent is not to submit any more than today's response at any time in the future.*
>
> If the ITC insists on the remaining 1991 data before 26 February, we will comply by dragging out the process as long as we can. . . . *[W]e plan to ask DOC and ITC to terminate their investigations no later than 4 March. By this time, we will have the expected favorable preliminary AD decision from DOC. . . .*
>
> *Outside legal counsel, Dorsey & Whitney, concur that Ethyl cannot win the final injury determination from the ITC. There is no valid reason to continue a process that will lead to an unfavorable decision on Ethyl's petitions while we are in a very positive position to maximize the current situation.*

JA-2345-46 (emphasis added). Ethyl's recognition that its ITC submissions would not withstand scrutiny, together with its decision to withdraw its petition rather than provide discovery that would expose its fraud, belie Ethyl's attempt to portray this case as little more than an "accountant's debate." Resp. Br. at 4. Indeed, many complex financial frauds are based on accounting manipulations.

Ethyl's fraudulent petitioning would not enjoy *Noerr* immunity in the Ninth or D.C. Circuits because the misrepresentations tainted the ITC adjudicatory process — i.e., the misrepresentations were of information which was crucial to ITC decision making (three of five statutory factors). This case presents the Court with the opportunity to deter such misconduct in the future — and protect the integrity of administrative adjudicatory proceedings — by clarifying inconsistencies that have arisen within the Circuit Courts of Appeal regarding the scope of immunity in cases of intentional misrepresentation and fraud.

I.

THE CIRCUITS ARE SPLIT ON WHETHER AND THE EXTENT TO WHICH FRAUDULENT PETITIONS SUBMITTED TO ADJUDICATORY ENTITIES ARE SHIELDED BY *NOERR*

A. The Circuits Are Split As To Whether The *PRE* "Objectively Baseless" Test Applies In Cases Of Intentional Misrepresentation And Fraud

Ethyl contends that the Third Circuit harmonized its application of *PRE*'s "objectively baseless" test in the instant context of intentional misrepresentation and fraud with the Ninth and D.C. Circuit holdings in *Kottle v. Northwest Kidney Centers*, 146 F.3d 1056 (9th Cir. 1998), *cert. denied*, 119 S. Ct. 1031 (1999), and *Whelan v. Abell*, 48 F.3d 1247 (D.C. Cir. 1995). Resp. Br. at 14.

However, Ethyl concedes that the fundamental "difference" between the Third Circuit's analysis on the one hand, and the Ninth and D.C. Circuits on the other, is that the Third Circuit analyzed whether Ethyl's fraud rendered its prior petitioning " 'objectively baseless'. . . within the [two-part test] framework established by the Court in *PRE* for evaluation of all allegedly 'sham' litigation." Resp. Br. at 16.

Contrary to the Third Circuit, the Ninth and D.C. Circuits have both expressly held "*PRE's two-part 'sham' test inapplicable* where there was 'proof that a party's knowing fraud upon, or its intentional misrepresentations to, the court deprive the litigation of its legitimacy." *Whelan*, 48 F.3d at 1255 (emphasis added); *Kottle*, 146 F.3d at 1060. The Ninth and D.C. Circuits have held that intentional misrepresentation and fraud destroy the legitimacy of the decision making process and are therefore are not shielded by the *Noerr* immunity doctrine.

It is precisely this difference in analysis — together with the resulting difference in whether and the extent to which the Circuits are prepared to immunize fraud perpetrated on a court or agency — that form the gravamen of this petition for certiorari.

The facts of this case illustrate the important distinction between the Ninth and D.C. Circuits' precedents (which do not immunize litigation predicated upon fraud), from the Third Circuit's opinion in this case (which immunizes fraud so long as the petitioning is not "objectively baseless" in its entirety). Here, Cheminor alleged — and the District Court and Third Circuit assumed — that Ethyl had fraudulently misrepresented its sales, profitability, prices, and cash flow to establish the material injury prong of its ITC petition. In all, Ethyl had fraudulently misrepresented three of five statutorily-mandated factors, each of which the ITC was required to consider in adjudicating Ethyl's petition. It is obvious that when Ethyl misrepresented that its profits had decreased by millions of dollars, that it had lost customers and sales to Cheminor, and that the average selling price of Cheminor's ibuprofen was less than the price of Ethyl's ibuprofen, it would significantly influence the ITC in favor of Ethyl's claim that it was being materially injured by the importation of Cheminor ibuprofen. Nevertheless, the Third Circuit found that Ethyl's misconduct was immunized because Ethyl had not fraudulently misrepresented two factors and Cheminor could not prove that

those two factors would not have been sufficient for Ethyl to prevail.[1]

Unlike the Third Circuit, the Ninth and D.C. Circuits would not apply *PRE*'s "objectively baseless" test in this case of intentional misrepresentation and fraud. Instead, those Circuits would evaluate whether the fraud that Ethyl perpetrated on the ITC in its petition against Cheminor was material to and therefore tainted the ITC's decision making process, thereby depriving the adjudication of its legitimacy. An adjudicatory process in which Ethyl intentionally misrepresented three of five factors that the ITC was required by law to consider is a decision-making process tainted by fraud and thereby deprived of its legitimacy. *Kottle*, 146 F.3d at 1060; *Whelan*, 48 F.3d at 1255; *Cheminor Drugs, Ltd. v. Ethyl Corp.*, 168 F.3d 119, 133 (3d Cir. 1999) (Sloviter, J., dissenting).

Ethyl's misconduct is all the more egregious in the administrative adjudicatory context. Cheminor was not entitled to discovery during the 45-day period within which the ITC rendered its preliminary determination. Such discovery would have enabled Cheminor to uncover and prove Ethyl's fraud. Further, much of the evidence upon which the ITC relied in its opinion was redacted as subject to a protective order, so that neither Cheminor nor the district court knew precisely what evidence was considered or what weight was allocated to evidence of the statutory factors misrepresented. Thus, it was not possible to determine from the ITC record how Ethyl's fraudulent presentation altered the ITC's preliminary determination and how the ITC would have ruled had the process not been tainted by fraud. This situation, often present in agency proceedings, is all the more reason that the focus in vitiating *Noerr* immunity should be on whether the misrepresented

1. Cheminor does not concede that Ethyl presented truthful information regarding two statutory factors, as the Third Circuit assumed. However, whether fraud materially infected only three or all five statutory factors makes no difference under the prevailing analysis in the Ninth or D.C. Circuits.

information was material to the agency determination and not whether the plaintiff can prove that the misrepresentations changed the outcome reached by the agency.

In short, the Third Circuit here applied *PRE*'s "objectively baseless" analysis in the context of fraud and intentional misrepresentation — the very circumstances in which the Ninth and D.C. Circuits have held that *PRE* does not apply at all. These contradictory approaches cannot be harmonized, and the conflict that they represent can only be resolved by this Court. Accordingly, this Court should grant Cheminor's petition for certiorari.

B. The Circuits Are Split As To Whether *PRE* Overrules Longstanding Principles Set Forth In *California Motor Transport* And Its Progeny

Ethyl dismisses as dictum taken out of context this Court's statement of the longstanding rule that "[m]isrepresentations, condoned in the political arena, are not immunized when used in the adjudicatory process." *California Motor Transport v. Trucking Unlimited*, 404 U.S. 508, 513, 92 S. Ct. 609, 613 (1972) (and cases cited therein); Resp. Br. at 9-11. There, this Court cited misrepresentation as an example of one of many forms of misconduct not immunized by *Noerr*. Ethyl seizes upon the fact that *California Motor Transport* did not itself involve fraud or misrepresentation in an effort to minimize the importance of this longstanding rule of law, which courts nationwide have ever since cited and applied as a binding statement of valid law. *See*, *e.g.*, Pet. at 7 and cases cited therein.

Ethyl argues that the *California Motor Transport* "dicta" is no longer viable after *PRE*, which according to Ethyl provides the framework "for evaluation of all allegedly 'sham' litigation." Resp. Br. at 16. However, Ethyl's characterization of current law is accurate only in the Third Circuit. As Ethyl itself concedes, the Ninth and D.C. Circuits view petitioning

predicated upon fraud and intentional misrepresentation as one of three "variants" of sham litigation that the doctrine does not shield. Resp. Br. at 14. Objectively baseless petitioning, repetitive petitioning, and fraudulent petitioning are each independently viable examples of sham litigation in those two Circuits. *Kottle*, 146 F.3d at 1060; see also *Whelan*, 48 F.3d at 1255. This is not so in the Third Circuit, which held here that immunity is lost only if the petitioning is objectively baseless.

Ethyl purports to fear that *California Motor Transport's* simple statement of law could be misinterpreted to include "virtually any allegation of misrepresentation in a judicial or administrative setting," however innocent and immaterial the misrepresentation. Resp. Br. at 11. This contention ignores longstanding jurisprudence to the effect that *Noerr* immunity is not lost in cases of innocent mistakes regarding immaterial facts. *See* Pet. at 7 and cases cited therein; *see also Kottle*, 146 F.3d at 1060, and *Whelan*, 48 F.3d at 1255 (immunity is lost in cases of "knowing fraud" or "intentional misrepresentation"). Significantly, Ethyl does not contend that its misrepresentations regarding its sales, profitability, prices, and cash flow were innocent mistakes or immaterial to the ITC's decision making process.

In short, nothing in *PRE* purports to overrule the longstanding and settled principle set forth in *California Motor Transport* and its progeny that misrepresentations in an adjudicatory context do not enjoy *Noerr* immunity from federal antitrust liability. This Court should grant Cheminor's petition for certiorari and reverse the Third Circuit's decision to the contrary.

II.

THE THIRD CIRCUIT'S HOLDING IS CONTRARY TO SUPREME COURT PRECEDENT REGARDING THE VIABILITY OF STATE LAW CAUSES OF ACTION EVEN IF ETHYL'S PETITIONING MISCONDUCT IS IMMUNIZED FROM ANTITRUST LIABILITY BY *NOERR*

Ethyl cites *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 381-82, 111 S. Ct. 1344, 1355 (1991), for the proposition that the holding in *California Motor Transport* has been limited to its facts. Resp. Br. at 11. However, Circuit Courts of Appeals nationwide, before and after *City of Columbia,* have cited and relied upon *California Motor Transport* for its succinct statement of the longstanding principle that misrepresentations in the adjudicatory process are not immunized by *Noerr*. *See* Pet. at 7 and cases cited therein.

In addition, *City of Columbia*'s holding is contrary to the Third Circuit's decision to grant *Noerr* immunity to Ethyl's collateral wrongdoing in violation of state common law doctrines. In *City of Columbia*, this Court held that the plaintiff's outdoor advertising competitor and a city that enacted zoning ordinances restricting outdoor billboards were immunized from federal antitrust liability by the *Noerr* doctrine. However, the competitor's "private anti-competitive actions such as trade libel, the setting of artificially low rates, and the inducement to breach of contract," together with alleged violations of the state Unfair Trade Practices Act, were not protected by *Noerr* immunity. *City of Columbia*, 499 U.S. at 384, 111 S. Ct. at 1356. Accordingly, this Court reversed by granting *Noerr* immunity on the petitioning activity, but remanded these state causes of action for trial. *Accord, Whelan*, 48 F.3d at 1254-57 (disallowing a *Noerr* defense to common law torts where material misrepresentations were made to state securities regulators and in prior litigation).

Contrary to *City of Columbia*, the Third Circuit here upheld *Noerr* immunity in instances where Ethyl committed collateral wrongdoing in violation of a myriad of state common law doctrines. Even if Ethyl were entitled to *Noerr* immunity from federal antitrust liability, *City of Columbia* teaches that this immunity does not extend to causes of action sounding in contract or tort.

Although Ethyl contends that the Third Circuit "applied the same First Amendment principles on which *Noerr-Pennington* immunity is based" in dismissing Cheminor's state law claims, Resp. Br. at 17, this Court's First Amendment jurisprudence does not recognize an absolute privilege applicable to misrepresentations in petitioning otherwise protected by the First Amendment. For instance, intentional and reckless falsehoods are not immunized by the First Amendment if they appear in a First Amendment petition (i.e. a complaint), and may support a state law claim of defamation. *McDonald v. Smith*, 472 U.S. 479, 105 S. Ct. 2787 (1985); accord *Whelan*, 48 F.3d at 1254 (no "potential for collision" between *Noerr*, First Amendment, and common law torts such as tortious interference, abuse of process, or malicious prosecution because "[w]e see no reason to believe that the right to petition includes a right to file deliberately false complaints."). However, in the Third Circuit's view, even intentional and reckless falsehoods enjoy *Noerr* and First Amendment immunity so long as the misrepresentations are made in a petition that is not objectively baseless in its entirety.

Moreover, assuming Ethyl's misrepresentations enjoy federal antitrust immunity when made in an adjudicatory context, there is no reason to extend that immunity to collateral tortious misconduct committed entirely outside the adjudicatory forum. Specifically, there is no reason to extend the immunity Ethyl received for its fraud on the ITC to its marketplace efforts to benefit from that fraud by attempting to coerce Cheminor to become its captive supplier of ibuprofen at prices substantially

lower than the less-than-fair-value dumping prices complained of by Ethyl it its AD/CVD petitions. Similarly, *Noerr* and the First Amendment provide no basis to immunize Ethyl's interference with Cheminor's customer relationships by making existing and potential buyers insecure regarding Cheminor's ability to provide a reliable source of ibuprofen supply. Ethyl caused this insecurity by fraudulently obtaining ITC action that temporarily excluded Cheminor from the ibuprofen market. Ethyl used this insecurity to coerce Cheminor's customers and potential customers into undertaking expensive regulatory action without which they would not have been able to buy Ethyl's ibuprofen at that time or in the future. Ethyl's foregoing tortious acts could not have succeeded had it not filed its fraudulent ITC petition. Even if the petitioning itself is an immunized activity, this does not excuse and should not immunize Ethyl's misconduct in using fraudulently-obtained administrative action to commit independent wrongs in the marketplace.

Cheminor's state claims, including tortious interference and unfair competition, provide a remedy for damages caused by Ethyl's misconduct. Contrary to Ethyl's contentions, any criminal liability for perjury and submission of false information that could be visited upon Ethyl employees would not compensate Cheminor for its losses. Even assuming Rule 11 sanctions were awarded in ITC or other agency proceedings, this would not require Ethyl to compensate Cheminor for losses caused by Ethyl's misconduct. Accordingly, certiorari should be granted, the judgment of the Third Circuit should be reversed, and Cheminor's common law causes of action remanded for trial.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in its prior brief, Cheminor's petition for a writ of certiorari should be granted.

Respectfully submitted,

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